IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.5590 of 2005
in
FIRST APPEAL 98 OF 2004.

Tulsi Construction Company ..Applicant

versus

Vimal kumar Tiwari ..Respondent.

Mr.V.Y.Sanglikar for the Applicant.

Mr.V.A.Thorat with Milind M. Sathaye for the Respondent.

with

CIVIL APPLICATION NO.5217 of 2005
in
FIRST APPEAL 98 OF 2004.

Vimal Kumar Tiwari ..Applicant

versus

Tulsi Construction Company ..Respondent.

Mr.V.A.Thorat with Milind M. Sathaye for the Applicant.

Mr.V.Y.Sanglikar for the Respondent.

Coram : S.R.Sathe, J.
Dated : 1st February, 2006.

P.C.

1. Both the parties in First Appeal No.98 of 2004 have challenged the order passed by the First Assistant Court Receiver dated 28.9.2005 whereby the First Assistant Court Receiver fixed the royalty at Rs.8000/- per month in respect of the three suit shops and determined the security deposit amount at Rs.9,00,000/-/

2. The brief facts giving rise to the above mentioned civil application are as under :

. M/s. Tulsi Constructions and Associates filed S.C.Suit No.3772 of 2001 against the appellant, original defendant No.1 for declaration that the action of defendant No.1 putting his locks forcibly to the suit shops is illegal and for mandatory injunction directing the Defendant No.1 to remove the said locks and remove themselves from the suit premises and permanent injunction restraining the defendant No.1 from obstructing them (plaintiffs) with peaceful possession and occupation of the suit shops.

3. The defendant No.1 filed written statement and opposed the suit claim. In short, it was the stand of the defendant No.1 that initially he had

purchased shop No.4 out of the suit building for Rs.2,50,000/- and accordingly paid the amount and agreement was also executed. However, subsequently M/s. Tulsi Construction and Associates agreed to hand over three suit shops in lieu of shop No.4 as the area of the said shops was equal to that of shop No.4. Thus he contended that he received the possession of the suit shops legally.

4. After the evidence was adduced by both the parties the trial judge negatived the contentions of the defendant no.1 and decreed the suit in plaintiffs favour.

5. Being aggrieved by that order the original defendant No.1 filed First Appeal No.98 of 2004 in this court on 5.2.2004. On the same day the court (Coram R.S.Mohite, J.) directed that by way of interim relief pending the final hearing the court receiver to continue on the suit premises. It was further ordered that the party in possession is permitted to remain in possession as an agent of the Court Receiver on payment of royalty and security subject to execution of the usual agreement and undertakings. In view of the said directions the court granted stay to the execution of the decree.

6. The High Court Receiver under the orders of the Court was pleased to appoint M/s. Nadkarni and Company as valuer to inspect the suit premises for the purpose of fixing reasonable and fair royalty and security. In pursuance of the same the valuer carried out the work and submitted the report, wherein they determined the royalty of Rs.12,000/- per month and security amount at Rs.16,00,000/-. This was done by them on the basis of ready reckoner for the properties in Bombay.

7. The First Assistant to Court Receiver, after giving opportunity to both the learned Advocates to make their submissions on the report of the valuer came to the conclusion that the royalty as well as the security deposit amount suggested by the valuer is on higher side and while determining the same the valuer had not taken into consideration the depreciation note of the old building as per the ready reckoner. So, considering all aspects he determined the royalty amount at Rs.8000/- per month and security deposit amount at Rs.9,00,000/-.

8. The applicant, original defendant No.1 filed C.A.No.5217 of 2005 and challenged the said order

alleging that the amount of royalty and security deposit fixed by the receiver are exorbitant and prayed that the royalty be fixed at Rs.5000/- per month and reasonable amount of security deposit be determined. As against this the original plaintiff filed the C.A.No.5590 of 2005 and alleged that the royalty and security deposit fixed by the Court Receiver is less and it be increased by taking into consideration the settled principles and guide lines fixed in royalty and security amount.

9. The only point which falls for my consideration is whether the royalty amount and security amount fixed by the receiver is proper or whether it is necessary to modify the same.

10. Shri Sanglikar, learned Advocate for the Original Plaintiff argued before me that at what rate the royalty amount should be fixed and determined is settled by this court in a case Majid Ahmedbhoy Oomerbhoy vs. Rashid Oomerbhoy 2005(4) ALL MR 215. I have carefully gone through the above authority. In that case both the parties to the litigation had challenged the royalty fixed by the receiver. One had alleged that it was exorbitant while the other was saying that it was fixed at

lower rate. In that case the receiver had fixed the royalty at the rate of 9% on the market value of the property. Considering the facts and circumstances of that case the court came to the conclusion that the basis on which the receiver fixed royalty at 9% is correct. However, there is nothing in the said ruling as a result of which it can be said that the decision in the said case has laid down that in each and every case the royalty should be fixed by adopting the same method or that it should be 9% of market value . It is needless to say that while considering the question of royalty or security deposit one has to take into consideration all peculiar facts and circumstances of the case and then decide the question.

11. The learned Advocate for the Appellant, original Defendant No.1 submitted that the market value determined by the valuers is in fact exorbitant. If we peruse the order passed by the receiver then also it appears that the receiver has pointed out certain lacunas in the said report of the valuer. It does appear that the ready reckoner for the year 2004 was taken into consideration by the valuer while doing so he had lost sight of the fact that the construction in question is about 8 to

10 years old. Besides this, while considering the market value of any particular property just as one has to take into consideration other aspects, it is also necessary to see whether there is any litigation in respect of the said property. It is needless to say that the property involved in litigation will not have the same market value which the other normal property not involved in the litigation will have. So, having regard to all aspects I think that the market value determined by the receiver at Rs.9,00,000/- cannot be said to be exorbitant under the circumstances of this case.

12. The learned Advocate for the Appellant submitted that the respondent in the present appeal i.e. the original plaintiff had in fact valued the suit property at Rs.45,000/- when he filed the suit. Apparently it seems that the said valuation was not correct. However, merely because the plaintiff had valued the property at Rs.45,000/- in the suit that by itself is not sufficient to hold that it is correct market value of the said property. Nor it can be said that now the plaintiff is estopped from raising any contention about the market value determined by the receiver. The main question is whether it is in fact necessary for the party in

possession to deposit the amount of Rs.9,00,000/- as security deposit. Firstly, it must be noted that admittedly in the instant case the receiver is in possession of the property and as per the directions of the court the original defendant No.1 would be in possession of the property as an agent of receiver. Once, we find that while admitting the appeal the Court (Coram: R.S.Mohite, J.) has stayed the execution subject to defendant executing usual agreement and undertaking, it is in fact not necessary to direct the defendant again to give the security deposit. It is needless to say that as per decree the plaintiff is entitled to get possession of the said property, but because of the stay to the execution of the decree today plaintiff cannot get possession and so it is necessary to protect and preserve the property in question. Not only that, but it is also necessary to protect the interest of the plaintiff in whose favour the decree has been passed. Considering this aspect, once it is said that as per order dated 5.2.2004the original defendant No.1 is to give undertaking to this Court that he would not dispose off or part with or assign or transfer or sale or encumber or mortgage or exchange or offer as security or otherwise in any way alienate or deal with or dispose of the suit

property or any part thereof and would not cause any damage to the suit property it has to be held that the interest of the plaintiff in respect of the suit property is protected. Again there is no necessity to direct the appellant to pay the security deposit. Considering this aspect, I am in fact of the view that there is absolutely no necessity to increase the security deposit amount of Rs.1,50,000/- which was the amount fixed earlier by the receiver.

13. So far as the royalty is concerned, fair and reasonable royalty in respect of the premises under reference would mean fair return on the present market value of the property. So, if we hold that the market value determined by the receiver viz. Rs.9,00,000/- is proper, then even calculating the return on the same at the rate of 9% would come to Rs.6750/- per month. So, the amount of royalty of Rs.8000/- per month fixed by the receiver cannot be said to be exorbitant or unreasonable. On the contrary, having regard to all the facts and circumstances of the case I think that it is the correct royalty.

14. In view of the above, the order passed by the First Assistant Court Receiver is modified to

some extent and the security deposit amount is fixed at Rs.1,50,000/- and the royalty fixed by the Receiver at Rs.8000/- per month is confirmed.

15. The Appellant is directed to pay the royalty and security deposit, if not paid as yet, within four weeks from today, failing which the stay shall automatically stand vacated.

16. Both civil applications are disposed of accordingly.

(S.R.Swathe, J.)

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Mr.C.A.Thorat with Milind Sathaye for Vimal Kumar Tiwari

Coram : S.R.Sathe, J.
Dated : 1st Feb., 2006

Final Order:

1. The order passed by the First Assistant Court Receiver is modified to some extent and the security deposit amount is fixed at Rs.1,50,000/- and the royalty fixed by the receiver at Rs.8000/- per month is confirmed.

2. The appellant is directed to pay the royalty and security deposit if not paid as yet, within four weeks from today, failing which the stay shall automatically stand vacated.